Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re	)	
	)	
Review of the Syndication	)	MMB Docket No. 95-39
And Financial Interest Rules,	)	
Sections 73.659-73.363	)	
of the Commission's Rules	)	

COMMENTS OF CBS INC.

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CBS Inc. ("CBS"), by its attorneys, hereby submits these Comments in response to the Commission's Notice of Proposed Rulemaking in the above proceeding, released April 5, 1995 ("Notice").

I. Introduction and Summary.

The Notice carefully summarizes the tortuous course of administrative and judicial review of the financial interest and syndication rules since the Commission first tentatively decided in 1983 that systemic changes in the competitive position of the three older television networks in the television programming marketplace justified the phasing out of all aspects of those rules by 1990. That review culminated in the Commission's 1993 Second Report and Order that, as the Notice explains, "concluded that the market conditions present at that time did not justify continuation of the fin/syn regime."[1] Out of what then-Chairman Quello called "an abundance of caution -- rather than record support,"[2] however, the Commission temporarily retained a ban on active domestic syndication by the three older networks, and temporarily prohibited those networks from holding or acquiring financial interests or syndication rights in first-run syndicated programming that is not solely produced by them.[3] Those remaining fin/syn restrictions will expire on November 10, 1995, unless the Commission affirmatively acts to retain them.[4]

The United States Court of Appeals for the Seventh Circuit, which had overturned the Commission's 1991 decision retaining a revised but comprehensive fin/syn regulatory

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[1] Notice at ¶9, citing Second Report and Order in MM Docket No. 90-162, 8 FCC Rcd 3282 ("Second Report & Order"), recon. granted in part, Memorandum Opinion and Order in MM Docket No. 90-162, 8 FCC Rcd 8270 (1993), aff'd sub nom. Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309 (7th Cir. 1994).

[2] Separate Statement of Chairman Quello, Second Report and Order, 3 FCC Rcd 3282, 3350.

[3] The temporary rules also contained "anti-warehousing safeguards" and reporting requirements. Notice at ¶5.

[4] Notice at ¶8. The expiration date was to be two years from the date that certain antitrust consent decrees were modified by court order to delete provisions that were analogous to the Commission's original fin/syn restrictions. That judicial relief was granted on November 10, 1993. United States v. National Broadcasting Company, 842 F. Supp. 402 (C.D. Cal. 1993).

regime as being "not adequately reasoned,"[5] affirmed the two-year transition to full deregulation, but made clear that if the Commission retreats from its 1993 findings justifying complete repeal, "it had better have an excellent, a compelling reason."[6] The current proceeding, which was contemplated in the Second Report and Order as a prelude to the presumptive November 10 expiration of the rules, is intended "to afford an opportunity for opponents of fin/syn repeal to demonstrate that retention of restrictions is warranted, with the burden of proof on those who would retain the restrictions."[7]

In these initial comments, CBS will not burden the Commission with yet another comprehensive reargument of the case for fin/syn repeal. The enormous record in this proceeding is replete with evidence going back to 1980[8] that has already been found by the Commission and by the Court of Appeals -- twice -- to be fully sufficient to justify elimination of the remaining rules. As the Notice makes clear, it is the proponents of continued regulation who "will need to convince" the Commission "with empirical data

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[5] Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1050 (7th Cir.1992).

[6] Capital Cities/ABC, Inc. v. FCC, 29 F.3d 309, 316 (7th Cir. 1994). At the same time, Chief Judge Posner noted the court "might have preferred and certainly would not have forbidden an immediate rescission of restrictions whose mismatch with the current situation in the broadcast industry becomes more evident by the day." Id.

[7] Notice at ¶8.

[8] After a massive effort in data collection and analysis, the Commission's independent Network Inquiry Special Staff long ago concluded that the fin/syn and prime time access rules should be repealed because they "have failed to achieve the Commission's policy objectives," so that "it is not possible to identify adverse consequences to the public interest that would flow from repeal." Final Report, New Television Networks: Entry, Jurisdiction, Ownership and Regulation (October 1980) at 517.

and economic analysis" that the "current status of the program production and distribution markets and the activities of the networks since 1993" justify the continuation of fin/syn restrictions.[9]

The Notice lists 14 factors that the 1993 Commission considered to be relevant to this review of the remaining fin/syn rules.[10] Some of these factors relate to developments in various aspects of the video marketplace since the June 5, 1993 effective date of the Second Report and Order. Others relate to the activities of the older and "emerging" networks during this period. As to all of them, as noted above, the proponents of the rules have the burden of demonstrating that such post-June 1993 developments or behavior require perpetuation of fin/syn regulation.

In these initial comments, we will note for the record some of these very recent marketplace developments -- developments that document the continuing and, indeed, accelerating transformation of the video programming acquisition, production and distribution marketplace, and underscore the reason why the singling out of three competitors for disciminatory regulation is so fundamentally unfair. The relevant business activities of the affected networks under the post-June 1993 revised rules are documented in the periodic reports that ABC, CBS and NBC have been required to file under those

[9] Notice at ¶12.

[10] Id.

rules, the most recent of which was filed on March 1, 1995.[11] While we will also make some observations about CBS's activities under the current fin/syn regime, those reports speak for themselves in reaffirming the proposition that network practices since the effective date of the Second Report and Order provide no basis for continuing fin/syn regulation. Finally, we argue below that the Commission should repeal the remaining fin/syn restrictions immediately, rather than allow the existing regime to continue until November 10.

II. The Marketplace Changes That Convinced The Commission In 1993 That The Record Justified Repeal Of The Fin/Syn Rules Have Continued Unabated.

Much of the updated marketplace information most relevant to this proceeding has already been summarized by the Commission itself in the texts of its notices in two other pending rulemaking proceedings relating, respectively, to the Prime Time Access Rule and the television station ownership rules.[12] Comprehensive information on the changing competitive positions of the three affected networks in the video marketplace is also set forth in Part II of an extensive economic study prepared on behalf of Capital

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[11] Network Television Program Ownership And Syndication Report For CBS Inc., MM Docket No. 90-162, March 1, 1995 ("March 1 CBS Network Report").

[12] Notice of Proposed Rulemaking, In Re Review of the Prime Time Access Rule, Section 73.658(k) of the Commission's Rules, MM Docket No. 94-123, released October 25, 1994 ("PTAR Notice") at ¶¶16-22; Further Notice of Proposed Rulemaking, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221, released January 17, 1995 ("Station Ownership Notice") at ¶¶24-28.

Cities/ABC, CBS and NBC and submitted to the Commission for the record in response to the PTAR Notice.[13] As we observed in CBS's initial comments in the PTAR proceeding, the twin premises of "network dominance" of program production and "network control" over programming decisions of network affiliates historically furnished the basis not only for PTAR, but also for an array of other regulations, prominently including the financial interest and syndication rules, directed specifically and exclusively at ABC, CBS and NBC.[14] Among other things, the Joint Economic Study examined in detail the current viability of these original premises, and demonstrated that they are utterly without foundation in today's marketplace. Some of the appendices and tabulated data in Part II of that study contain marketplace information directly responsive to the Commission's interest in post-June 1993 developments related to the program acquisition, production and distribution markets in general.[15] We briefly highlight below some of this updated information.

As noted above, the Commission has already found that the voluminous record compiled through 1993 fully justifies, without need for further supplementation, repeal of all financial interest and syndication rules. The examples noted below of the changes and

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[13] "Is ABC, CBS or NBC Dominant Today?", An Economic Analysis of the Prime Time Access Rule, Part II, Economists Incorporated (March 7, 1995), submitted for the record in MM Docket No. 94-123 ("Joint Economic Study").

[14] Comments of CBS in MM Docket NO. 94-123 (March 7, 1995) ("CBS PTAR Comments") at 2.

[15] See, e.g., Joint Economic Study, Appendices A, E-G.

structural realignments that have taken place during a short period of time dramatize both the ever-quickening pace of technological and marketplace changes, and the fact that many new entities -- including very large companies and cooperative ventures unencumbered by fin/syn regulation -- have in the last two years become fully engaged, or are poised to engage, in extraordinarily vigorous competition with the three older networks in all of the markets in which we participate.

A. Video Producers And Distributors Continue To Form Large Strategic Alliances.

For the purpose of evaluating post-June 1993 marketplace changes, the Commission is soliciting information on "mergers or acquisitions involving networks, studios, cable systems, and other program providers since [the] 1993 fin/syn decision took effect."[16] Among the most dramatic examples of completed mergers and acquisitions during this period was the combination of Viacom Inc., Blockbuster Entertainment Corp. amd Paramount Communications, Inc. into an entity that has aptly called itself a "single, incomparable global media colossus,"[17] and has been referred to elsewhere as a "behemoth in the entertainment business, with sales of about $12 billion, making it slightly smaller than Time Warner Inc., with roughly $14 billion in sales."[18] The special significance of

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16 Notice at ¶12.

17 See CBS PTAR Comments at 5.

18 New York Times, February 15, 1994 at A-1.

this transaction for this proceeding is that the combined companies (with more than three times the revenues of CBS) instantly became a preeminent force in production (both motion pictures and television programs), television program syndication (off-network and first-run), broadcast station ownership, cable system ownership, and videocassette distribution, <u>and</u> has applied its enormous resources to the development of a new television network to assure the national distribution of its program product. The remaining fin/syn rules, which bar CBS from even a small-scale business combination that involves active domestic television program syndication, were of course no impediment to this series of enormous transactions.

Another large post-June 1993 transaction that epitomizes the kind of combinations that are creating new large, integrated competitors in broadcast and cable network production and distribution was the acquisition by Turner Broadcasting System, Inc. of Castle Rock Entertainment, which produces motion pictures and television programs (including the NBC series "Seinfeld"), and New Line Cinema Corporation . These deals "give Turner a long-sought stake in the film production business, providing it with programming for ... Turner Network Television and the WTBS superstation," and generally "reflect the increasing vertical integration of the entertainment business as companies seek to control both production and distribution of entertainment programming." [19] Like virtually all of the cable and broadcast competitors of the three

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[19] <u>New York Times</u>, August 18, 1993 at D-1.

original broadcast networks in program production and national distribution , Turner is also a participant in the broadcast syndication business.

Finally, the $2.3 billion acquisition by Cox Enterprises of the cable systems of the Times Mirror Corporation, announced in June 1994, exemplifies the continuation of the regional and national consolidation of cable system ownership, which is both a defensive strategy to prepare to meet the upcoming competition in video distribution from regional telephone companies, and an offensive strategy to enhance the combined systems' buying power in the program acquisition marketplace.[20] Other examples of consolidation in the cable industry abound. Prominent among them are Time Warner's venture to manage the Newhouse Broadcasting cable systems serving 1.4 million subscribers, "to expand its television distribution capabilities -- whether through cable or broadcasting,"[21] and Comcast's $1.27 billion purchase of the U.S. cable systems of Maclean Hunter Ltd.[22]

There are, of course, many more examples of smaller transactions (e.g., Cannell/New World), as well as other large combinations in various stages of development (e.g., Seagrams/MCA, Fox/MCI). The common denominator of all this activity is the perceived need of substantial companies to position themselves for new future domestic and global marketplace competition. ABC, CBS and NBC should be permitted to

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[20] New York Times, June 6, 1994 at D-1.

[21] New York Times, September 13, 1994 at D-1.

[22] New York Times, June 20, 1994 at D-1.

participate fully in this competition, and thoroughly outdated regulations like fin/syn that serve only to inhibit our ability to do so should be repealed.

B. Since June 1993, Fox Has Become Even More Entrenched And Two New Networks Have Been Established.

The Notice also seeks input on "the growth of additional networks, including the development of Fox and its position vis-a-vis the major three networks."[23] As the Commission noted in the Second Report and Order, the aggregate prime time viewing share of the three affected networks had "dropped from 93 percent in 1975 to 61 percent during the 1990-91 television season" and then to 59% in 1992,[24] supporting the Commission's conclusion that "whatever market advantage the networks once enjoyed [in program acquisition and distribution] has further diminished."[25] During the just-ended 1993-94 season, that three-network aggregate prime time viewing percentage decreased to 57%.[26] As Chief Judge Posner presciently said in explaining his warning that only "an excellent, a compelling reason" could justify continuation of fin/syn regulation, "[t]he three original networks are even weaker today [in July 1994] than they were in March [1993] when the decision to deregulate was made, and no doubt they will be weaker still

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[23] Notice at ¶12.

[24] Second Report and Order, 8 FCC Rcd 3282, 3303-4.

[25] Id. at 3303.

[26] Wall Street Journal, April 14, 1995 at B-5.

when the new proceeding is to commence."[27]

It is, of course, centrally important to this proceeding that a major beneficary of this ratings decline is the Fox Network, which is exempted from the operation of the remaining fin/syn rules as an "emerging network." For its part, Fox boasted that "[f]or the first time in our history we knocked off one of the big three," referring to its third place 1994-95 finish among viewers in the 18-49 age group.[28] Needless to say, another recent landmark Fox-related development since June 1993 was the May 1994 announcement of Fox's agreement with New World Communications to form new network affiliations and other joint operations, an agreement that as of December 1994 had generated, directly or indirectly, 68 changes of network affiliations in 37 markets, and that has been widely heralded as a major new vehicle for both production and syndication of programming.[29]

Finally, January 1995 marked the commencement of service by two new broadcast networks whose proprietors include enormous, deep-pocketed, horizontally and vertically integrated entities (Time-Warner and Viacom/Paramount), "that hope to build a national

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[27] Capital Cities/ABC, Inc. v. FCC, 29 F. 3d 309, 316. Although it is convenient and useful to cite aggregate network viewing shares to illustrate the continued trend of viewing away from the three regulated networks to their unregulated network competitors (in this case, primarily Fox and basic cable networks), that formulation masks the undeniable fact that ABC, CBS and NBC compete fiercely with each other.

[28] New York Times, April 17, 1995 at D-8.

[29] Broadcasting and Cable, December 5, 1994 at 50-56. Since December 1994 there have been other related affiliation switches, raising the total, by our estimate, to 80 affiliation changes in 40 markets.

network of TV stations to broadcast programs they produce" and are "primed for expansion."[30] Like Fox, the proprietors of these latter-day networks are also major program producers and syndicators that are explicitly exempt from the operation of the remaining fin/syn restrictions. These new networks also gained instant credibility because of their relationships with major station group owners (Tribune and Chris Craft), and among "[t]he losers may be the other broadcast networks, which could see top studio product diverted from their pipelines... ."[31]

C. New Video Distribution Systems Are Rapidly Developing.

The final category of post-June 1993 marketplace developments that the 1993 Commission wanted to be considered in this final fin/syn review was "the growth in the number and types of alternative outlets for sale of programming."[32] Current information on the development and status of currently operational alternative video distribution systems is summarized in the Station Ownership Notice at ¶¶26-28. Data comparing current penetrations of these alternative systems with historical data is contained in the Joint Economic Study at pp. 7 et seq., and accompanying appendices and tables. For the purposes of the instant Notice, it is useful to note the growth of some of these distribution

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[30] Los Angeles Times, April 18, 1995 at F-1. See also, Joint Economic Study at pp. 13-16.

[31] Broadcasting and Cable, January 2, 1995 at 31.

[32] Notice at ¶12.

systems just between 1993 and 1994. The number of cable networks, for example, grew from 94 to 109,[33] and cable penetration grew from 57.2 million to 59 million households.[34] SMATV subscribers increased by 10%, MDS subscribers by 50%, and home earth station units by 50% in just that one-year period.[35] With regard to direct-to-home satellite distribution, industry sources have estimated that DBS subscribers will exceed one million in 1995 and may exceed 10 million by 2000.[36]

Finally, the prospect of provision of video services by telephone companies directly to their customers, either under the video dialtone regulatory regime or under new legislative ground rules, now seems certain. A joint venture among Bell Atlantic Corp., Nynex Corp., Pacific Telesis Group and Creative Artists Agency, announced in November 1994, has hired two prominent broadcast network executives to manage its program development efforts.[37] More recently, three other Regional Bell Operating Companies announced a similar, $500,000,000 venture with Walt Disney Co. that "better positions [them] to bring a new generation of entertainment to a vast new audience."[38]

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[33] Joint Economic Study, Table A-5, p. 68.

[34] Id. at Table A-6, p. 69.

[35] Id. at Table A-7, p. 70.

[36] Id. at 12, citing Cablevision, November 14, 1994 at 6. DirectTV, the largest provider of DBS program service, is owned by GM Hughes Electronics.

[37] Electronic Media, April 10, 1995 at 1.

[38] Los Angeles Times, April 19, 1995 at A-1. Just before the June 1993 effective date of the revised fin/syn rules, U.S. West agreed to invest $2.5 billion in Time Warner Entertainment

Whatever the legislative and regulatory ground rules that ultimately apply to telco video services, their ability to compete in the television program production, acquisition and distribution marketplaces will be formidable. Their looming presence dramatizes the fact that the fin/syn rules are rooted in a 1960's marketplace context that is surely unrecognizable today.

III. Network Behavior Since June 1993 Provides No Basis For Continued Fin/Syn Regulation.

One of the rationales for the "abundance of caution" that prompted the phased elimination of the fin/syn rules was that it provided an opportunity to evaluate the Commission's 1993 prediction that "'networks would not act in ways detrimental to diversity and competition."[39] As with all the other areas of inquiry in this proceeding, the proponents of fin/syn regulation have the burden of proving that the Commission's assessment in 1993 was incorrect.[40] The Second Report and Order required ABC, CBS and NBC to submit biennial reports to the Commission containing the information that the Commission was interested in receiving directly from the affected networks about this

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for the purpose of cooperating in the upgrading of the Time-Warner cable systems and the creation of new services in an arrangement that "is emblematic of the future convergence of the two technologies and a significant push forward in efforts to create a superhighway into the home." New York Times, May 17, 1993 at A-1.

[39] Notice at ¶10.

[40] Notice at ¶12.

transition period. Those reports provide comprehensive information on the retention, acquisition and exercise of financial interests and syndication rights in prime time entertainment programming, both historically and with respect to rights retained or acquired since June 1993.

As stated above, we will permit these periodic reports to speak for themselves at this stage of the proceeding, and simply note that they demonstrate that changes in network program acquisition practices have been very gradual. The three affected networks continue to buy the overwhelming majority of their prime time entertainment programming from outside producers,[41] and in only one instance has CBS acquired a financial interest in the syndication revenues from a network series acquired under the revised rules.[42] This is not surprising in light of our oft-repeated maxim that the quality of programming -- not the identity of the producer or the party holding "back-end rights" -- must be the preeminent factor in network programming acquisition and scheduling decisions. The truth of this maxim is confirmed by a recent report that "of the seven [new] network-owned productions on the [1994-95] fall schedule, ... none is still on the air."[43]

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[41] Network-produced entertainment series programming as a percentage of all prime time hours over the course of various years, including the last full broadcast season (1993-94) is tabulated in the Joint Economic Study, Appendix E.

[42] March 1, 1995 CBS Network Report, as amended on May 11, 1995, at p.9.

[43] New York Times, April 17, 1995, at D-8.

Of course, network behavior in the syndication marketplace since 1993 cannot be directly evaluated because the revised rules include a total ban on active domestic syndication of off-network or first-run programming. Where the three affected networks have been allowed to possess interests in syndication revenues, we have been required by the revised rules to enter into arms-length arrangements with independent syndicators for the actual distribution of that programming. Information provided by those syndicators at our request on sales of programming in which CBS has an interest has been included in our periodic reports to the Commission.[44] The sales practices of these independent syndicators -- which include Paramount/Viacom and Twentieth Television (Fox), among others -- do not reflect network influence or direction, but it is worth noting that there is no indication that any "network-owned program is syndicated primarily to that network's affiliates."[45]

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[44] Precisely because of the arms-length nature of the relationships, we had no control over the format in which these syndicators maintained and provided the information we requested from them for the purposes of the reports.

[45] The Notice includes this reference to the concept of "affiliate favoritism" in its enumerated "relevant factors" for review. Notice at ¶12. Most of the independent syndicators reporting to CBS did not attempt to break their sales out by the affiliation (or non-affiliation) of the buyer because they did not have the information in their data bases.. In the case of one that did (Twentieth Television), it appears that over the two-year sales record of the CBS-produced GORDON ELLIOT SHOW, the number of first-run syndication sales to CBS affiliates was the same as the number made to independent stations (including Fox affiliates). March 1 CBS Network Report at Exhibit O. We have also made estimates based on a recent snapshot of affiliation relationships on sales to CBS affiliates of two CBS-produced programs that have recently entered the syndication market, TOP COPS and RESCUE 911. Roughly 7 % of sales of the former program by Genesis Entertainment have been to CBS affiliates, as have 17% of the sales of the latter by The Family Channel. Broadcasting and Cable Factbook, 1995.

IV. The Commission Should Accelerate The Expiration Date Of The Rules.

The Commission has requested comments on whether the November 10, 1995 expiration date of the rules should be advanced, assuming that the rules' proponents do not meet their burden of proof. Specifically, the Notice asks "whether doing so would unduly disrupt any business relationships that have been established in reliance on the presently scheduled expiration date of November 10, 1995."[46] CBS respectfully suggests that "reliance" by beneficiaries of regulations that are flagrantly discriminatory in purpose and effect, and that the Commission has declared to be unjustified by current market conditions, cannot be reasonable. In any event, immediate removal of restrictions on active syndication by networks and on acquisition of financial interests in first-run syndciated programming can hardly be disruptive, since the affected networks start with a zero market share and will be only incipient competitors at most for the near future.

The marketplace developments we have briefly summarized above represent trends that are not only fully documented not only in the record in this proceeding, but also in those of several other proceedings in which the Commission is considering the modernization of its regulatory mission. These trends involve fundamental and permanent changes in the communications industry that unquestionably will continue to accelerate, since they are largely based on the momentum of technological development and global

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[46] Notice, at ¶14.

competition that is irreversible. The remaining fin/syn rules should be repealed immediately.

V. Conclusion.

The remnants of fin/syn regulation, and the notions of monolithic network dominance of video program acquisition and distribution that they represent, are some of the clearest examples of the kind of outdated regulations that simply have no place in today's marketplace environment. There is no conceivable basis for the conclusion that marketplace developments and network behavior during the last two years provide any basis, much less "an excellent, a compelling reason," for reversing the Commission's unambiguous judgment in 1993 that the remaining fin/syn rules should be repealed.

Respectfully submitted,

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